United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1179

To be argued by:
SHEILA GINSBERG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

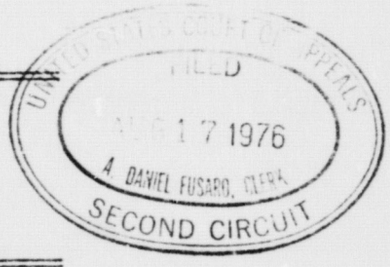
Plaintiff-Appellee,

-against-

CALVIN YAGID,

Defendant-Appellant

Docket No. 76-1179



BRIEF FOR APPELLANT
CALVIN YAGID

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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QUESTIONS PRESENTED

1. Whether the trial Judge's refusal to conduct a hearing to determine physical competence to stand trial deprived appellant of his right to a fair trial.

2. Whether it was error to allow Dr. Abrahamsen to testify at trial on the question of appellant's competency at the time he appeared before the Grand Jury.

STATEMENT PURSUANT TO RULE 28(a)(3)

PRELIMINARY STATEMENT

This is an appeal from a judgement of the United States District Court for the Southern District of New York (The Honorable William C. Connor) rendered February 27,1976, after a jury trial, convicting appellant of six counts of false swearing in violation of 18 U.S.C. §1623. Appellant was sentenced pursuant to 18 U.S.C. §4208 (B) to 90 day period for observation and study to determine, prior to final sentence the condition of his mental and physical health. Appellant is currently released on bail pending appeal.

At trial appellant was represented by retained counsel. This court assigned the Legal Aid Society Federal Defenders Service Unit as counsel on appeal pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

On December 30,1974 appellant was indicted for six counts of false swearing (18 U.S.C. §1623) in his October 7, 1974 testimony before a grand jury of the Southern District of New York investigating loan-sharking in the garment industry. The charges of false swearing arose out of appellant's stated inability to recollect the existance of certain loans to which he was not a party but which

allegedly existed between persons known to appellant.*

I. Pretrial Proceedings Concerning Appellant's Physical and Mental Ability to Stand Trial.

A. September 3, Appearance**

The September 3,1975 court appearance of defense counsel and the prosecutor was called to assess a feasible trial date. It was inspired by appellant's hospitalization, the second in six months, and at the time of the proceeding appellant was in the Intensive Care Unit at the Brooklyn Veterans' Hospital (Transcript dated September 3 at 1***). Counsel explained that appellant had been diagnosed as having blood clots on his lungs, a recurrence of the condition he suffered during the spring of 1975 (Transcript dated September 3,1975 at 2).

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* The indictment is "B" to appellant's separate appendix.

** Inexplicably the original district court docket sheet (See exhibit "A" to appellant separate appendix) in this case fail to reflect the September 3,1975 appearance, as well as the appearances occuring on November 3, 5, and 14, 1975 and the full hearing occuring on November 10,1975. Transcripts of all these proceeding have now been filed with the District Court and have been transmitted along with an amended docket sheet, as part of the record on appeal.

*** Numerals preceded by a date are page reference to the transcripts of the pre-trial proceedings occurring on that date.

At that earlier hospitalization it was discovered that appellant had:

> "...a large right mainstem pulmonary ambolus with several large branches of the pulmonary artery to the right middle and upper lopes (which) were completely blocked."*

This initial hospitalization lasted more than eight weeks. One week was spent in the Intensive Care Unit. During the period doctors determined that the tensions caused by appellant's physical condition exacerbated his service connected "anxiety neurosis" producing weight loss of 25 pounds. Appellant was on intravenous and then oral anti coagulants as well as intermuscular sedation and "large" doses of oral valium which had only "moderate effect. See Exhibit "D" to appellant's separate appendix at page 2.

In light of this history, appellant's rehospitalization in September of 1975 - which lasted 4 weeks - made it impossible for counsel to predict when appellant would be physically able to withstand the pressures of a trial. Consequently only a tentative trial date of September 29,1975 was set by the district court judge, with the understanding that a new report as to appellant's health would determine future adjournments (transcript dated September 3,1975 at 2).

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* This diagnosis appears at page two of the report of the Brooklyn Vetaran's Administration Hospital. The report is annexed as "D" to appellant's separate appendix.

B. November 3,1975 Appearance

Defense Counsel objected to the Court's appointment of the physician, Dr. Iraj Iraj, named by the prosecutor for the purpose of determining appellant's physical competance to stand trial (transcript dated November 3,1975 at 2). Counsel explained that appellant's objection was not to the requirement that he be examined but rather to the partiality of the doctor chosen exclusively by the government (transcript dated November 3,1975 at 3). Counsel also objected to a letter sent to the doctor by the prosecutor, in which the doctor is virtually directed to find appellant physically able to withstand the pressures of a trial (transcript dated November 10,1975 at 10). Specifically, the objected to portion of the letter provided:

> "The purpose of our asking you to examine Mr. Yagid is to have you confirm that he is physically able to stand trial for a two or three day period."* (emphasis in original)

Judge Connor agreed that the letter had the effect of suggesting and encouraging the result the prosecutor wanted:

> "I think the letter is unfortunate. I think that letter should have directed him to make an examination to determine whether or not Mr. Yagid is physically and mentally able to stand trial instead of asking him to confirm that he is able:..."
> (transcript of November 3,1975 at 10)

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* The letter to Iraj is annexed as Exhibit "E" to appellant's separate appendix.

Dispite the recognition that the choice of doctor and the substance of the letter might combine to taint the outcome of the examination the judge declined to disqualify Iraj. The judge feared that to do so would result in a delay to the trial then scheduled to begin on November 10, 19,5 (transcript dated November 3,1975 at 11).

C. November 10,1975 Proceeding

Judge Connor stated for the record that the medical opinion of Dr. Iraj, communicated to the judge in an exparte telephone conversation, was that appellant was physically able to withstand the rigors of a trial (transcript dated November 10,1975 at 2). In response the defense counsel moved for a hearing at which he could cross-examine Dr. Iraj and present the evidence to establish that appellant was physically incompetent to stand trial (transcript dated November 10, 1975 at 5).

In support of the motion counsel asserted that since appellant's hospitalization the medications prescribed for his physical condition* drastically impaired appellant's ability to communicate with counsel (transcript dated November 10,1975 at 3). Specifically, counsel explained that

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* The hospital report indicated that the medications appellant was to take after his discharge from the hospital were:

Coumadin 5 mgs. daily
Robilussin p.r.n.
Colace b.i.d.
Valium 10 mgs. t. id.
Vitamin B-complex
Pavabid 150 mgs. q. 12 hrs.
Dalmane 30 mgs.
Nembutal p.r.n for sleep
Surfak

See Exhibit "D" at page 3.

he wanted a hearing to present expert testimony on the necessity of this medication and the effect of it on appellant's mental acquity. In addition, and in contradiction to Judge Connor's impression of the Iraj opinion, counsel asserted that it was his understanding from his own oral communication with Iraj that the doctor believed that appellant's emotional condition might exacerbate his physical condition (transcript dated November 10,1975 at 26).

On the government's strenuous objection to holding a medical hearing Judge Connor denied the defense motion. The judge ruled that, in light of Dr. Iraj's conclusion, there no longer remained any question as to the status of appellant's physical health. Specifically, the Judge stated:

> "...you (defense counsel) haven't given me any evidence except your hearsay statement of what Dr. Eroge (sic) said and since I spoke to Dr. Eroge (sic) myself and he expressed no such opinion to me, in fact expressed just the opposite opinion, that there was no physiological reason why the defendant could

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* Also before the judge on the motion were appellant's statement that he didn't feel well and that he had just had to take a nitroglycerine pill (transcript dated Nov. 10, 1975 at 11-12). Appellant's disorientation and memory loss were apparent from his inability to remember when he had been in the hospital. In response to the Judge's questions he mistated that the last time he had been in the hospital had been June when, in fact, he had just been released from the hospital in September (transcript dated November 10,1975 at) Throughout the inquiry by the court appellant repeated now important it was for him to take the stand and testify at trial (November 10,1975 at 12,17,18)

not stand trial . . . "*

(Transcript dated November 10, 75 at 27)

However, because Dr. Iraj had also indicated to the judge, some doubt about appellant's mental stability, the judge agreed to hold a hearing on that issue alone (Nov. 10,1975 at 9).

Dr. Irving Barnett, a psychologist employed since 1952 by the Veterans Hospital testified for the defense. Appellant, who had been referred to the out-patient psychiatric clinic by the medical doctors at the Veterans Administrative Hospital, had been in treatment with Dr. Barnett for approximately two months (transcript dated November 10,1975 at 30-31). Dr. Barnett diagnosed appellant as suffering from an "anxiety reaction severe" which causes extreme "psychological" and "physiological

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* Subsequently Dr. Iraj submitted a written report which concluded in pertinent part:

> Chronic obstructive pulmonary disease with recent pulmonary embolism, marked anxiety neurosis, mild hypertension.
>
> At this time from the available clinical date (sic) patient is able to withstand two or three days.of trial. However, it is my opinion that he should be judged competent by a psychiatrist. Also the possibility of pursistant tachy cardia(due to anxiety or emotional stress) Producing cardiac difficulties should be considered.
>
> (Emphasis Added)
>
> The report is annexed as "F" to appellant's separate appendix.

reactions" under circumstances of stress (transcript dated November 10,1975 at 30).

As illustrative of appellant's condition Dr. Barnett described his observations of appellant in a situation of minor stress which occurred in the routine of the clinic. According to Barnett, when clinic staff members innocently presented appellant with misinformation appellant's breathing became " extremely hard," he could "hardly speak" and he was almost choking. (transcript dated November 10,1975 at 35). In Barnett's opinion, appellant's condition would:

> "...grossly hamper his ability to think, to recall facts and to be able to respond in a reasonable manner. I think that the inability of the defendant to tolerate anxiety is such that I would wonder whether there might not be even some outbursts not as a result of the defendant's desire or willingness to be inappropriate, (to be inappropriate) in the court, out rather by his psychological and emotional instability to control his emotions.*
> (transcript dated Nov. 10,1975 at 27)

Moreover, with regard to the effect of the various medications prescribed by the medical doctors at the Veterans Administrative Hospital** Barnett asserted that he observed appellant to be groggy and "very unsteady on his feet" but he candidly testified that he was not qualified to effer

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* Dr. Barnett also commented that it was his informed judgment that the intensity of appellant's anxiety reaction created a danger of exacerbating his medical condition (transcript dated November 10,1975 at 36).

** Hospital records established that the doctors had prescribed:

Coumadin	Vitamin C
Valium (10 mil.grams)	Sertoy
Vistaril	Robitussin
Vazol Darvon	Milantin
Darvon	Tylenol

(transcript dated November 10,1975 at 60-61)

an opinion as to the chemical composition and chemical effect of the medications on appellant's mental abilities. (transcript dated November 10,1975 at 32-4, 60-62). In light of the foregoing Dr. Barnett concluded that in the stressful situation of a trial appellant would be unable to provide the information required of him by counsel. (transcript dated November 10, 1975 at 39-40).

After Dr. Barnett's testimony, counsel offered to present the appellant's medical records and the testimony of a Dr. Rosenberg, appellant's treating physician at the Veteran's Administrative Hospital, but Judge Connor rejected the offer, as unnecessary. Having decided to temporarily accept Dr. Barnett's opinion of mental incompetance the Judge was not concerned with appellant's physical incompetance. The ruling as to mental competance was made without prejudice to the government's right to reopen the hearing after appellant was examined by a government appointed psychiatrist (transcript dated November 10,1975 at 64).

D. November 14,1975 Appearance

The Assistant United States Attorney and defense Counsel appeared in court as a result of the complaint made by the government's psychiatrist Dr. David Abrahamsen that he had been prevented from conducting his examination of appellant. According to the prosecutor , Abrahamsen had telephoned him to report a heated altercation with appellant which arose when the doctor refused to accede to

defense counsel's request that he be present during the examination or be permitted to tape the session (transcript dated November 14,1975 at 2-3).

Defense counsel responded by explaining that the recent deterioration of appellant's physical condition has been complicated by marked paranoid reaction to all governmental agencies. Counsel's request to be present during the examination was not for purposes of challenging the validity of the diagnosis but only to alley appellant's fears (transcript dated November 14,1975 at 3-5,9). When Counsel attributed appellant's verbally assaultive conduct to the fact that he was ill, the Judge responded as follows:

> I think I should state for the record that conversations which my law clerk has had with Mr. Yagid give rise to a very substantial speculation that Mr. Yagid is pulling on a very excellent act. He understands everything he needs to understand.
>
> x x x
>
> ...he seems to understand exactly what was happening the other day when he was here. He was very alert to all the nuances of the proceeding, based upon his comments to my law clerk and there is every reason for the court to believe that he is a manipulative person who is staging this while performance in order to get a delay and I am going to find out whether that is the case.....
>
> (Transcript dated November 14, 1975 at 6-7)

The judge rejected the defense suggestion that appellant be examined by a panel of Veterans Administrative Psychiatrists and directed that appellant submit to another examination by Dr. Abrahamsen (transcript dated November 14,1975 at 12-13).

January 12-13, 1976 - Hearing on Mental Competence

At the outset of the re-opened hearing on appellant's mental capacity, defense counsel, Lawrence Hochheiser, re-asserted appellant's demand for a hearing at which the Government would have to establish that appellant was physically able to stand trial. The Court declined to hold such a hearing unless appellant came forward with additional evidence to establish that appellant's condition had changed since Dr. Iraj's examination.* (Transcript dated January 12, 1976 at 9-12).

Dr. David Abrahamsen testified for the Government.** He described appellant as "unruly" and "restless" and related how appellant "screamed" and "cried" and coughed "constantly" (Transcript dated January 12, 1976 at 17). With regard to the constant coughing, the doctor acknowledged that it might be the result of the fears actually experienced by appellant when faced with the examination. Similarly, Abrahamsen explained appellant's concededly elevated blood pressure (160/110 and 160/100) as the result of his anxiety about Abrahamsen's examination (Transcript dated January 12, 1976 at 22, 37).

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*Subsequently, when the Judge began to retreat from this ruling, expressing some uncertainty about the sufficiency of Iraj's hearsay report, the prosecutor's strenuous objection persuaded the Judge to adhere to the requirement that appellant present new evidence (January 12, 1976 at 124-26).

**The order directing that Abrahamsen examine appellant specifically provides that the purpose of the examination was to determine whether the appellant is presently competent to stand trial and able to properly assist in his own defense. See Document #6 to the Record on Appeal. The order is exhibit "G" to appellant's separate appendix.

Appellant, in Abrahamsen's opinion, did suffer from real anxieties but, according to this witness, he consciously tried to exaggerate his symptoms. According to Abrahamsen, appellant was able to understand the charges against him and assist in his defense*(Transcript dated January 12, 1976 at 24, 28).

Dr. Leon R. Pomeroy, a doctorate in psychology testified for the defense. Dr. Pomeroy, an employee of the Veterans' Administration,was treating appellant for "biofeedback" training, the process by which a patient is made aware of his own tensions and then taught to control them (Transcript dated January 13, 1976 at 130-132). In Dr. Pomeroy's session with appellant he observed that it was hard to communicate with him, that appellant's anxiety was manifested by his inclination to listen only to himself and that his concentration was impaired. Pomeroy concluded that in stressful situations appellant's anxiety reaction would interfere with his ability to communicate with his lawyer (Transcript dated Janaury 13, 1976 at 148-49).

Dr. Barnett, recalled by the defense, described how appellant had deteriorated since November so that it was now even more difficult to communciate with him. According

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*In addition to the psychiatric testimony the Government presented the testimony of three persons - Raymond E. Cabel, (Tr. dated January 12, 1976 at 66-96-A), David W. Spitzer (97-104), and Israel Mechlowicz (104-121)- concerning their observations of appellant on or about December 30, 1975, at the garment cutter's union hall. Although none of the witnesses had actually spoken to appellant or overheard any of his conversations, they each asserted that his behavior was not "abnormal" (Transcript dated January 12, 1976 at 84, 101, 121).

to Barnett, appellant had become very confused in his conversation, incapable of distinguishing between the recent past and the distant past. In addition, his thinking suffered from a distinct paranoid reaction (Transcript of January 13, 1976 at 153).

In response to the prosecutor's questions which implied that appellant sought psychiatric help in order to create a defense to this indictment, Dr. Barnett revealed that, on the contrary, appellant's impetus to therapy had been the warning from his medical doctors that his severe anxieties could further damage his physical condition (Transcript dated Janaury 13, 1976 at 169).

In Barnett's opinion, while appellant understood the charges against him, his ability to aid in his defense was severely impaired (Transcript dated January 13, 1976 at 161-62, 164-167).

At the close of the hearing the Court credited Dr. Abrahamsen's testimony and found that appellant was competent to stand trial (Transcript of January 13, 1976 at 178).

II. The Trial

Appellant was charged with false swearing in his October 7, 1974 testimony before a Grand Jury, where in he asserted that:

> Count 1: he did not recollect that Whitey Liebowitz has lent money to various individuals;
>
> Count 2: he did not recollect anybody to have lent money to any other individual;
>
> Count 3: he denied attempting to collect money from a Mr. Harold Wellan;
>
> Count 4: he did not recollect any individual who owed money to a Seymour Lebensfeld;
>
> Count 5: he did not recall discussing with nor did he know if a man named Robert Kolbert owed money to Seymour Lebensfeld;
>
> Count 6: he did not know the name "Steve Adlman."

The Government's case relied primarily on the testimony of Harold Whellan (73-125*); Robert Kolbert (215-202) and Steven Adlman (202-240).**

Whellan asserted that in June of 1968 he borrowed $10,000 from Whitey Liebowitz who, in Whellan's presence, gave $5,000 of that money to appellant in repayment of Whellan's debt to him (80-81). Whellan also asserted

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*Numerals in parenthesis not preceded by a date refer to pages in the transcript of the trial.

**The Government also presented the testimony of Margaret King, the forelady of the Grand Jury who testified as to the quorum in the Grand Jury, the grant of immunity to appellant and the scope of the Grand Jury investigation (24, 26-27) and William Blitz, the Grand Jury reporter who testified to the accuracy of the transcript (46-52).

that he owed an $1800 gambling debt to a Davey Goldberg and that on January 29, 1974, he and appellant had a conversation in which they discussed this debt and the fact that appellant was to collect it for Goldberg (85). This conversation was tape recorded and the tape and a transcript of it were introduced into evidence (86-100).

Robert Kolbert testified that he had borrowed money from Seymour Lebensfeld (127-28) and that on one occasion in September of 1972, appellant accompanied Lebensfeld when he arrived at Kolbert's store to collect a payment (129-30). According to Kolbert, on October 3, 1972, he , Lebensfeld and appellant met in a restaurant to discuss the fact that Kolbert had not made his payments to Lebensfeld and that in the future he would make the payments to appellant (137-38). During that conversation, the name Steven Adlman was mentioned and Kolbert asserted that appellant refered to Adlman by his full name (138). This conversation was taped and the tape was played for the jury (146).

Kolbert also testified to a conversation he had with appellant on October 10, 1973, at which time Kolbert told appellant he couldn't pay him. Kolbert told appellant to speak to "Steve" about Kolbert's problems and appellant agreed (151). That conversation was also taped and introduced into evidence (152-53).

Steven Adlman testified and identified appellant whom he claimed he met in the fall of 1972 (204). According to Adlman, appellant, whom he had seen approximately 20 times (206), knew his last name because on one occasion in 1974 appellant returned to Adlman a bad check that the latter had endorsed (214-15).

After the Government rested (241), the defense moved inter alia for a mistrial on the ground that appellant's mental state during the trial precluded him from assisting in his defense. The motion was denied (243).

Dr Irving Barnett testified for the defense. At the time of the trial, Barnett had been treating appellant for three and a half months and had seen him approximately 40 times (245-47). Because of appellant's physical and mental condition, he was then receiving 100% disability payments (271).

According to Dr. Barnett, appellant was suffering from a severe anxiety reaction which interfered with his ability to concentrate, listen to a conversation or comprehend various nuances in the conversation (248).* Dr. Barnett further explained that a particular characteristic of appellant's mental state was his tendancy in periods of stress to interpret anything said to him in so literal a fashion as to dis-

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*Based on his review of appellant's hospital records--appellant was discharged from the army in 1946 because of this anxiety neurosis--as well as his own examination of appellant, Dr. Barnett was certain that his mental condition had existed for some time.

tort the ordinary meanings of the words used (250). For example, according to Dr. Barnett, when appellant was asked in the Grand Jury whether he ever collected money from Mr. Whellan, appellant would have understood that question to mean - did you obtain money by use of force (252). To this he could truthfully answer "no".

Walter Kenney, Esq., and Herbert Yagid testified as to their difficulty in attempting to communicate with appellant. Kenney, the lawyer who represented appellant at the time of his grand jury appearance, asserted that appellant was extremely nervous, under the influence of drugs and prone to give rambling and unresponsive answers to the lawyer's questions (300).

Herbert Yagid, appellant's brother, testified that in the mid 1940's, appellant was medically discharged from the navy due to "anxiety neurosis" (318). Mr. Yagid explained that since that time he has observed that it was extremely difficult to talk to his brother because he did not have the ability to concentrate on any given subject under discussion and was constantly distracted by irrelevancies (321).

Appellant did not testify in his own behalf.

In rebuttal, the Government presented the testimony of Dr. David Abrahamsen, the psychiatrist who, according to the order of the Court,* had been appointed solely for the purpose of determining appellant's competence to stand trial.**

Abrahamsen testified that while appellant did reveal some symptoms of anxiety neurosis, he nonetheless understood Abrahamsen's questions and gave responsive answers. Further, it was Abrahamsen's opinion that appellant was consciously exaggerating his symptoms (371). Abrahamsen based his conclusion of malingering on his belief that appellant was purposefully resistive to the examination. As an example, he cited the fact that appellant had refused to answer some of his questions (369). However, he neglected to reveal to the jury that he had specifically told appellant that he could choose not to answer any questions (Transcript dated January 12, 1976, at 17).

Abrahamsen also testified that in his review of the transcript of the Grand Jury proceedings he observed appellant engaging in the same resistence to questioning. Specifically, he referred to the fact that instead of answering the questions, appellant sought to resist by asking for

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*The order is annexed as "G" to appellant's separate appendix.

**Defense counsel did not object to Abrahamsen's testimony. The reason for this omission appears to be that counsel, relieved that the prosecutor withdrew his initial objection to Dr. Barnett's testimony (54-57, 59-60), did not focus on the inpropriety of allowing Abrahamsen to testify.

permission to consult with counsel (377).*

In addition to his conclusion that appellant was competent to testify before the Grand Jury, Abrahamsen revealed that he had previously found that appellant was competant to stand trial (372).**

In his charge*** to the jury, the Judge commented inter alia that the constitution gave appellant the right not to give evidence against himself (526). Defense counsel objected on the grounds that the Judge's remark improperly suggested that had appellant testified he would have provided incriminating evidence (550). The Judge attempted to correct this error with the following curative instruction:

> . . . At one point I referred to the fact that the Constitution gave the defendant the right not to give evidence against himself. That is the wording of the Constitution. I do not want to give you the impression that if the defendant had testified in this case, the evidence would have been against him. That just happens to be the way the Constitution is worded. What it means in our case is simply that this defendant, like every defendant, has the right to remain silent, and you should not draw any inference unfavorably to him from the fact that he chose to remain silent. (554-55)

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*Objection to this testimony resulted in the ruling that it be stricken from the record, but no where did the Judge explain to the jury that appellant, in asking to speak to counsel, was doing what he had a legal right to do.

**The Government again presented the testimony of Cabel, Spitzer and Mechlowicz regarding appellant's appearance at the Union Hall on December 29, 1975. (428-435, 436-442, 356-362)

***The charge is annexed as "C" to appellant's separate appendix.

After deliberation, the jury returned a verdict finding appellant guilty of all six counts (558).

III. The Sentencing

The Judge acknowledged that to date he had been continually hampered in this assessment of appellant by the fact that "nobody seems to know your true physical and mental condition as of the present time" (563). Based on the presentence report, which included the probation officer's observation that appellant was drugged on the day of the verdict (569-570), the Judge sentenced appellant to a 90-day period of observation and study in order to determine more accurately appellant's physical condition (563).

POINT I

THE TRIAL JUDGE'S REFUSAL TO CONDUCT A HEARING TO DETERMINE PHYSICAL COMPETENCE TO STAND TRIAL DEPRIVED APPELLANT OF HIS RIGHT TO A FAIR TRIAL.

The trial and conviction of a defendant who is incompetent during the Court proceedings against him is a violation of due process. Pate v. Robinson, 383 U.S. 375, 378 (1966); Bishop v. United States, 350 U.S. 961; United States v. Knohl, 379 F.2d 427, 434 (2d Cir. 1967); Clark v. Beto, 359 F.2d 554 (5th Cir. 1966); Sanders v. Allen, 100 F.2d 717, 720 (D.C. Cir. 1938). Clearly the requirement of "competence" includes both the mental and physical condition of the defendant. United States v. Schaffer, 433 F.2d 928, 930 (5th Cir. 1970); United States v. Knohl, supra, 379 F.2d at 436-7; Sanders v. Allen, supra. Obviously, a serious physical ailment can be so painful or its required medicaiton so debilitating (anesthetizing) as to fatally impair the mental awareness essential for knowing participation in the trial.

> Courts have recognized that a defendant who is 'mentally competent' within the meaning of 18 U.S.C. §4244 et. seq. may yet be physically incompetent' -- unable by virtue (for example) of a painful physical condition or the temporary effects of narcotics, to participate effectively in his own defense.
>
> (United States v. Schaffer, supra, 423 F.2d at 930)

In addition, a physical condition which can be aggravated as a result of tension and stress necessarily interferes with the availability of the defendant to testify and consequently hampers the conduct of the defense. See Bernstein v. Travia, 495 F.2d 1180, 1182, n. 2 (2d Cir. 1974).

When the evidence before the trial judge reveals that such physical disabilities may exist, the defendant is entitled to a hearing before he is adjudged competent to stand trial. Pate v. Robinson, supra, 383 U.S. at 385; United States v. Bernstein, 417 F.2d 641 (2d Cir. 1969); United States v. Knohl, supra, 379 F.2d at 437. On the facts of this case, Judge Connor's refusal to hold such a hearing deprived appellant of his constitutional right to a fair trial. Pate v. Robinson, supra.

Repeatedly, prior to trial, during the trial and after conviction, defense counsel asked the Court to conduct a hearing on the question of appellant's physical ability to stand trial. The concern was basically two-pronged: that appellant lacked sufficient mental awareness to effectively consult with counsel and aid in his defense as a result of the life-sustaining medications prescribed by appellant's physicians; and that appellant's physical condition was too precarious to risk the effect of the stress incidental to testifying at trial as appellant wanted to do.

The reason Judge Connor refused to hold the hearing was that Dr. Iraj, a Government appointed physician, had exa-

mined appellant and reported to the Judge, first over the telephone and then in a letter, that appellant was physically able to withstand two or three days of trial. The Judge reasoned that this report resolved the existing questions about appellant's health in favor of a finding of competence and in order to merit a hearing, appellant had to come forward with new evidence of physical incapacity. This was error.

At the time of the Iraj report, there had already been substantial evidence of appellant's severe physical disabilities. Twice during the preceding six months appellant had been hospitalized - the last time only one month before Iraj's examination due to massive pulmonary embolisms. Appellant was also found to be suffering from "severe anxiety." In total, appellant spent a period of three months in the hospital. At times his condition was so serious that he was treated in the hospital's intensive care unit. Upon discharge, he was fully disabled from any active labor and the following extensive list of medications was prescribed to treat his various diseases:

Coumadin
Valium
Colace b.i.d.
Pavabid
Dalmane
Rubitussin p.r.n.
Surfak p.r.n.*

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*This list prescribed when appellant was released from the hospital on June 22, 1975, was, according to Dr. Barnett, subsequently expanded to include: Vistaril, Darvon, Vazol Darvon, and Milantin.

With this background, the hearsay report of Dr. Iraj was insufficient to establish appellant's physical competence to stand trial. In United States v. Mercado, 469 F.2d 1148, 1152 (2d Cir. 1972) this Court articulated the lack of probative value in a brief and conclusory medical report when it is "offered on the crucial point at issue, and there exists no adequate opportunity to challenge the logic and foundations of its results."

An opportunity to cross-examine Iraj was particularly necessary in this case. As a preliminary matter, there was some question of bias on the part of the doctor, since he was the Government's choice and the Government's letter of instruction to him virtually directed that he find appellant competent. Judge Connor's acknowledgement, on appellant's motion to disqualify Iraj, that the doctor's objectivity may have been thus tainted, rendered highly improper the subsequent blithe acceptance of the doctor's conclusions without giving appellant an opportunity to explore the doctor's objectivity and reliability.

Moreover, in-Court testimony was essential because there was a fundamental dispute between defense counsel and the Judge about the substance of the doctor's report. At the time of the Judge's initial ruling on the report, he based the decision on an ex parte telephone conversation with the doctor. The Judge understood the doctor to have found that

a short trial presented no risk to appellant's health. In contrast, defense counsel, in his own oral communications with the doctor, understood that there was some risk involved. Obviously, the resolution of the dispute required in-Court testimony, and not the reliance of the Judge on his own memory of what the doctor had said in his ex parte communication.*

The need for a hearing was strengthened by the fact that Iraj's written report reveals that, indeed, the doctor did recognize that the trial might result in physical damage to appellant. Specifically, he noted that:

> The possibility of persistent tachycardia (due of anxiety or emotional stress) producing cardiac difficulties should be considered.

In light of this finding, appellant was entitled to an opportunity to inquire further on the extent of the risk, and under what circumstances it would be enhanced.

Moreover, additional evidence of physical incompetence persisted throughout the pre-trial and trial stages of the preceedings: Dr. Barnett asserted that hospital medical records indicated that appellant's physical condition could worsen in periods

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*Rulings based on out-of-court hearsay were characteristic of the proceedings below. For example, the Judge revealed that he had come to suspect that appellant was feigning mental illness because the Judge's law clerk, based on the law clerk's conversations with appellant, opined to the Judge that appellant understood the charges against him. On this record it is possible that the Judge's decision not to hold a hearing on the question of physical competence was simply not fairly determined.

of anxiety and stress. Even Dr. Abrahamsen conceded that the stress of his examination aggravated appellant's physical condition. Defense counsel asserted several times that due to the medication appellant was taking for his physical condition, counsel could not intelligently communicate with him. Finally, the probation officer who interviewed appellant on the day of the verdict, found that he was obviously drugged.

If appellant was, indeed, physically incompetent to stand trial, appellant's constitutional rights to a fair trial were severely infringed. Not only may appellant have been too drugged to understand the proceedings so as to aid counsel, but also, he was precluded from testifying because to do so created a risk to his life. In the context of this case, appellant's testimony was critical because the perjury charged was based on appellant's inability to "recollect" certain facts and only appellant could convince the jury that his lapse of memory was genuine.

The refusal of the trial Court to make an adequate determination of appellant's physical competence to stand trial mandates reversal.

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*The prejudice to appellant arisen out of his failure to testify was compounded by the Judge's instruction to the jury that the constitution gives the defendant the right not to give evidence against himself.

POINT II

IT WAS ERROR TO ALLOW DR ABRAHAMSEN TO TESTIFY AT TRIAL ON THE QUESTION OF APPELLANT'S COMPETENCY AT THE TIME HE APPEARED BEFORE THE GRAND JURY.

Over defense objection, and the considerable antipathy between appellant and Dr. Abrahamsen,* the district court ordered that the doctor be appointed to examine appellant for the explicit and sole purpose of determining his mental competence to stand trial. When the case went to trial, Dr. Abrahamsen, having concluded that appellant understood the charges and could aid in his defense, testified for the Government that appellant was mentally competent to appear before the Grand Jury and was therefore legally responsible for his testimony. Allowing the psychiatrist to testify at trial not only violated appellant's right to notice of the scope of the examination, but also admitted expert testimony not competent on the issue for which it was introduced.

In United States v. Driscoll, 399 F.2d 135 (2d Cir. 1968) this Court reversed a conviction for tax evasion on the grounds that the defendant had been unfairly deprived of notice when the psychiatrist - also Dr. Abrahamsen - who examined him solely for competency to stand trial was per-

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*Initially, the dispute was between defense counsel and Abrahamsen over whether counsel would be permitted to observe the examination.

mitted to testify at trial as to his sanity.* See also United States v. Matos, 409 F.2d 1245 (2d Cir. 1969). The Court explained in Driscoll, supra, 399 F.2d at 138, that had the defendant been on notice as to the scope of the examination, he would have been able to protect himself by assuring, for example, counsel's presence or requiring a video tape of the session.

These criteria are particularly appropriate in this case where appellant had tried, albeit unsuccessfully, to secure just these protections during Abrahamsen's examination. Had it been clear, at that juncture, that the doctor would also testify at the trial, defense counsel would have been able to prevail upon the Court to direct that he be allowed to observe the examination. Moreover, the record indicates that had counsel been present, the tenor if not the outcome of the examination would have been changed. It was Dr. Abrahamsen's refusal to allow counsel to be present during the examination that alienated and frightened appellant creating the concededly hostile atmosphere between appellant and Abrahamsen and perhaps tainting the outcome of the examination.

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*Because the error in admitting Dr. Abrahamsen's testimony is that it was violative of the notice requirement to appellant, the failure of counsel to object to the admission of the testimony did not waive appellant's right to relief on appeal.

In addition, admission of Abrahamsen's testimony at trial was error because it was not competent on the question of appellant's sanity at the time of the alleged perjury. The doctor's testimony was based only on his examination for purposes of competency to stand trial and that is insufficient:

> There is a vast difference between that mental state which permits an accused to be tried and that which permits him to be held responsible for a crime. * * * "[E]xaminations, made for the purpose of determining his competency to stand trial * * * require less than examinations designed to determine sanity for the purpose of criminal responsibility." [Citations omitted.]
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> Winn v. United States, 270 F.2d 326, 328 (D.C. Cir. 1959), cert. denied, 365 U.S. 848 (1961).

United States v. Driscoll, supra, 399 F.2d at 138; see also, United States v. Schultz, 431 F.2d 907, 912 (8th Cir. 1970).

Illustrative of the doctor's lack of preparedness to testify on this issue was his conclusion, based on appellant's Grand Jury demands to speak to counsel, that appellant was sane since he was as resistive to the Grand Jury process as he had been to the doctor's examination.

Because Abrahamsen's testimony was critical to the only contested issue below, its improper admission into evidence requires that the conviction be reversed.

CONCLUSION

FOR THE AFORESAID REASONS, THE CONVICTION SHOULD BE REVERSED AND THE CASE REMANDED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Aug 17, 1976

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

Sheila Gordon